SUPREME COURT, U. S.

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No. 692

In the

Supreme Court of the United States

OCTOBER TERM, 1967

PAUL V. BYRNE, JR.,

Petitioner,

vs.

CHICAGO TITLE AND TRUST COMPANY, individually and as trustee of trust agreements No. 42212 and No. 44999; THE CATHOLIC BISHOP OF CHICAGO, a corporation sole; THE FIRST NATIONAL BANK OF CHICAGO, individually and as trustee of trust agreement No. 51296-6; ROGERS, PAUL and HANSEN; QUINN, JACOBS, BARRY, and LATCHFORD; QUINN, JACOBS and BARRY; JOHN B. HENDRICKS; FRANCIS E. SCHLAX; ROBERT V. HOGAN; FRANK A. KARABA; DON W. FEELEY; KIRK L. MacKINNON; GEORGE A. HANSEN; VLADMIR G. URSE, LORETTO TENNES, individually and as trustee of the Thomas Byrne Estate Liquidation trust; ALBERT BUCKLEY; DONALD MASTERSON; NORA CAMPION; THADDEUS ADESKO; and ROBERT L. HUNTER,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR SEVENTH CIRCUIT

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Rogers, Paul and Hansen,
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The Scheffer Press, Inc.—ANdover 3-6850

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ARGUMENT

Petitioner in his "Statement of the Case" states the following concerning The First National Bank of Chicago:

> "The remnants of petitioner's estate including a $24,000.90 inheritance over which respondent First National Bank took control on April 20, 1964, in a fiduciary capacity (R. 14, 15, A. 12, 13), were readily gathered and sequestered by the various respondents participating in concert in subsequent civil proceed-

ings (R. 44-69, A. 29-31) between June 1963 and October 1965."

Presumably this applies to attorneys Don W. Feeley, George A. Hansen and to Rogers, Paul and Hansen (the name under which they practice) as they represented The First National Bank of Chicago in the proceedings referred to by Petitioner and are named as defendants in this proceeding.

The cases cited by Petitioner have no application to any facts concerning the participation of The First National Bank of Chicago, Don W. Feeley, George A. Hansen or Rogers, Paul and Hansen in the various proceedings referred to by Petitioner.

These Respondents' first appearance in an action involving Petitioner was on May 7, 1964 when The First National Bank of Chicago (hereinafter sometimes referred to as the "Bank") was served with a Petition in "Jean Byrne vs. Paul V. Byrne, Jr." Circuit Court of Cook County, State of Illinois, Case No. 63 C 8551 setting forth, among other things, that the Bank be restrained and enjoined from paying to Petitioner any monies, certificates of stock or credit by reason of any beneficial interest possessed by Petitioner under or by virtue of a certain trust.

The Bank was trustee of a certain trust, under which trust Ella Daly Byrne, the mother of Petitioner, was a life beneficiary. The assets of the trust were distributable upon her death to her children. Ella Daly Byrne died on April 20, 1964. The applicable provision of the trust in respect to this distribution is as follows:

"3. If ELLA DALY BYRNE shall survive me, the Trustee shall set aside out of the principal of Trust

'C' the sum of One Hundred Thousand Dollars ($100,000.00). The Trustee shall pay from the income and principal of said sum (using income first to the extent available) the sum of Five Hundred Dollars ($500.00) per month to ELLA DALY BYRNE so long as she shall live, or until the principal sum shall be exhausted, whichever shall first occur. Upon the death of ELLA DALY BYRNE after my death, the Trustee shall distribute said principal fund in equal shares to the then living lawful descendants, *per stirpes*, of ELLA DALY BYRNE."

The Bank contacted the five descendants who were the beneficiaries of the trust, one of whom lived in California, regarding the distribution of that part of the trust which was invested in securities. Upon approval of the stock plan of distribution by the five beneficiaries, the Bank proceeded to have the various securities transferred into their respective names.

On April 22, 1964, two days after the death of the life beneficiary, the Bank made distribution of $200.00 to Petitioner from the assets of the trust; on April 23, 1964 a further distribution was made by the Bank to Petitioner of the sum of $4,000.00 from the assets of the trust; and on May 8, 1964 the Bank distributed to Petitioner certain securities which had been transferred to Petitioner's name from the assets of the trust. The shares of stock that remained on May 8, 1964 for distribution to Petitioner were the following:

26 shares General Electric Co. common stock

31 shares United States Steel Corp. common stock

50 shares Texaco, Inc. capital stock

18 shares General Motors Corp. common stock

which on May 8, 1964 had not been returned from these companies or their Transfer Agents for delivery to Petitioner. These securities had a market value of approximately $9,396.00 on May 8, 1964.

On or about June 6, 1963, Jean Byrne filed an action against Petitioner in the Circuit Court of Cook County, State of Illinois entitled "Jean Byrne v. Paul V. Byrne, Jr.", Circuit Court Case No. 63 C 8551 for separate maintenance. A decree of separate maintenance was entered in said proceeding on November 22, 1963 providing for Plaintiff's support and maintenance and for the support and maintenance of those of their nine children who were minors at that time. On May 7, 1964 the Bank was served with a Petition in that proceeding as hereinabove stated that it be restrained and enjoined from paying to Plaintiff any monies, certificates of stock or credit by reason of any beneficial interest possessed by Petitioner under or by virtue of the aforesaid trust. Thereafter orders were entered by the court in the Circuit Court proceedings on May 11, 1964, May 13, 1964 and July 7, 1964 restraining or enjoining the Bank from transferring or releasing assets from the aforesaid trust to Petitioner. The Bank was not made a party defendant to the Circuit Court proceedings, but the aforesaid Petition and the Orders of May 11, May 13, and July 7, 1964 were served upon the Bank.

On October 8, 1965 the court entered the following Order in the Circuit Court proceeding:

"ORDER

"THIS CAUSE COMING ON FOR HEARING on the Motion of the defendant, PAUL V. BYRNE, JR., to vacate and dissolve the injunctive orders entered by this Court on May 11, 1964, and May 13, 1964, and

for other proceedings consistent with the opinion of the Appellate Court of Illinois, First District, First Division, in the appeal from such injunctive orders by the defendant, PAUL V. BYRNE, JR., to such Court, the parties hereto appearing in open court in person and by their respective counsel, and it appearing that:

"THE FIRST NATIONAL BANK OF CHICAGO presently holds, as Trustee under Trust known as Trust No. T-W 51296-6, assets for distribution to defendant, PAUL V. BYRNE, JR., having a present market value of approximately $11,900.00.

"IT IS HEREBY ORDERED AND DECREED:

"1. The said injunctive orders of May 11, 1964, and May 13, 1964, are hereby vacated, dissolved and set aside.

"2. THE FIRST NATIONAL BANK OF CHICAGO, as Trustee under Trust No. T-W 51296-6, is authorized and directed to deliver forthwith to HARRY BOOTH, as attorney and agent for PAUL V. BYRNE, JR., defendant herein, the assets described in Exhibit "A" attached hereto and made a part hereof.

"3. Upon receipt of said assets from said trust, HARRY BOOTH, as attorney and agent for PAUL V. BYRNE, JR., defendant, shall forthwith cause said assets to be sold in accordance with the agreement of the parties hereto and shall distribute the proceeds thereof as follows:

"(a) $2,400.00 to JEAN C. BYRNE, plaintiff, on condition that such funds shall be used for the support of herself and her minor children, said amount being in full payment of monies due her to November 1, 1965, under all support and maintenance orders of this Court heretofore entered herein.

"(b) $3,600.00 to DAVID J. BARRY, law partner of the attorney for the plaintiff, on condition such sum shall be deposited and held by DAVID J. BARRY in trust for JEAN C. BYRNE, the plaintiff herein, and shall be distributed by him to her in monthly installments of $300.00 each, commencing with November 1, 1965, to be used solely for her support and the support of her minor children, pursuant to the order of this Court entered on November 4, 1964.

"(c) $750.00 to FRANCIS E. SCHLAX, attorney for the plaintiff, in full satisfaction of all orders for attorney's fees heretofore entered in this matter.

"(d) $1,000.00 to THE FIRST NATIONAL BANK OF CHICAGO in payment for fees and expenses accrued to date in the handling of and distribution of the aforesaid assets of Trust No. T-W 51296-6.

"(e) $700.00 to JOHN HENDRICKS, judgment creditor of the defendant, PAUL V. BYRNE, JR., in full satisfaction and release of garnishment proceedings against THE FIRST NATIONAL BANK OF CHICAGO, pursuant to agreement and stipulation of said JOHN HENDRICKS to dismiss garnishment proceedings in 64 M1-510834.

"(f) The remainder to PAUL V. BYRNE, JR., the defendant herein.

"4. The order of this Court providing for the monthly payments of $300.00 from PAUL V. BYRNE, JR. to JEAN C. BYRNE shall be satisfied for the period ending October 31, 1966, and beginning with November 1, 1965, by the payment of the above sum of $3,600.00 to DAVID J. BARRY, as hereinabove

provided, as agent and trustee for the said JEAN C. BYRNE, plaintiff herein.

"5. The Court retains jurisdiction of this cause.

ENTER:

October 8, 1965 /s/ Robert L. Hunter
JUDGE

ORDER APPROVED:

/s/ Jean C. Byrne by F.E.Schlax
Plaintiff

/s/ Paul V. Byrne, Jr.,
Defendant

/s/ Francis E. Schlax
Attorney for Plaintiff

/s/ Harry R. Booth
Attorney for Defendant

"EXHIBIT 'A'

Securities held in Trust C under the Will of Walter S. Barnes, Trust No. T-W 51296-6, October 7, 1965

"26 shares General Electric Co. common stock
18 shares General Motors Corp. common stock
50 shares Texaco, Inc. capital stock
31 shares United States Steel Corp. common stock
$1,000 Commercial Credit Company Demand Note

(To be distributed by check)

Principal Cash	$364.89
Income Cash	$ 61.31"

which is attached as Exhibit "I" to Petitioner's Complaint in this proceeding. The Order not only bears the signature of Petitioner, but also of his then attorney, Harry R. Booth. No appeal was taken from said Order and no complaint is made that the Bank did not distribute the

remaining assets of the trust in accordance with said Order.

Mr. Booth is not a party plaintiff or defendant to the action before this Court.

On June 22, 1964 the Bank was served with summons and a Complaint in the matter entitled *"Paul V. Byrne, Jr.,* v. *The First National Bank of Chicago"*, Circuit Court of Cook County, State of Illinois, Case No. 64 CH 3589 wherein Petitioner prayed as follows:

> "Wherefore, the plaintiff prays that a decree of this Court be entered requiring the Bank to make such distribution without delay and also to pay the plaintiff such damages including attorney's fees as this Court may find plaintiff has incurred by reason of the Bank's failure to perform its fiduciary duty and for such further, different or other relief as to this Court may seem meet."

On motion of the Bank the Court on October 21, 1964 in that proceeding entered summary judgment in favor of the Bank. Petitioner filed a motion to vacate the Order granting summary judgment in favor of the Bank, which was denied. Petitioner appealed from this Order to the Appellate Court of Illinois, First District-Fourth Division.

Petitioner in his brief on appeal of that case stated in his "Nature of the Case" that he brought the suit as a "cestui que trust against the Defendant for breach of its fiduciary duty to the cestui in withholding the trust res in violation of the terms of the trust agreement and for dealing with adverse parties without advising or informing the cestui".

The Complaint in that case states Respondent was required to distribute the corpus of the trust to certain

beneficiaries upon the death of Ella Daly Byrne. No violation of any trust provision is set forth in the Complaint. There is no allegation the defendant exercised any trust powers not connected with the winding up and distribution of the trust. There is no allegation of facts in the Complaint in support of the phrase "and for dealing with adverse parties without advising or informing the cestui".

That action was essentially an action by Petitioner for alleged damages by reason of the Respondents not distributing to Petitioner prior to May 11, 1964 all of that part of the assets of the trust to which Petitioner was entitled upon death of his mother on April 20, 1964. The period involved was twenty-one days, of which fifteen were business days.

The Appellate Court affirmed the decision of the Circuit Court of Cook County in *"Byrne* v. *The First National Bank of Chicago"* 68 Ill. App. 2d 394 (Abs. decision February 4, 1966. Rehearing denied March 30, 1966) stating:

> "We find that there is no genuine issue as to any material fact and that the defendant did not breach any duty imposed upon it as trustee. A motion for summary judgment is properly granted where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Murphy* v. *Cory Pump & Supply Co.*, 47 Ill. App. 2d 382. Therefore, since the order granting the summary judgment was proper, the judgment of the Circuit Court is affirmed."

As far as these Respondents are concerned, Petitioner has been before (1) The Honorable Robert L. Hunter, Judge of the Circuit Court of Cook County, State of Illinois in the case entitled *"Byrne* v. *Byrne"*; (2) The

Honorable Cornelius Harrington, Judge of the Circuit Court of Cook County, State of Illinois in the case entitled *"Byrne* v. *The First National Bank of Chicago"*; (3) The Honorable Joseph J. Drucker, The Honorable Robert E. English and The Honorable John V. McCormack, Justices of the Appellate Court, Fourth Division, State of Illinois, in the Appeal of *"Byrne* v. *The First National Bank of Chicago"*; (4) The Honorable Joseph S. Perry, Judge of the United States District Court in this matter; (5) The Honorable Bernard M. Decker, Judge of the United States District Court on a Motion to Reconsider and Vacate the Order of Dismissal and a Motion for Leave to File an Amended Complaint in this matter; (6) The Honorable John S. Hastings, Chief Judge, The Honorable Latham Castle, Circuit Judge, The Honorable Roger J. Kiley, Circuit Judge, United States Court of Appeals on the Appeal of this matter and the Petitioner's Motion to Reconsider and Redetermine the Motion to Dismiss the Appeal.

The value of the securities that were to be delivered to Petitioner was approximately $9,396 on May 8, 1964. Petitioner in this action "demands judgment in the amount of 600 Thousand Dollars ($600,000) from the defendants jointly and severally".

CONCLUSION

Petitioner has not set forth any facts upon which to base a liability of the Respondent. He has had fair and impartial hearings. He and his attorney approved the order of distribution which involved the Respondent in this matter. Therefore the Petition to this court to issue its writ of certiorari to the United States Court of Appeals for the Seventh Circuit should be denied.

Respectfully submitted,

FRANK L. PAUL
GEORGE A. HANSEN
Attorneys for Respondents